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In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on June 17, 1977. The petition for a writ of certiorari was filed on July 12, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether references in the government's closing argument to the fact that the testimony of prosecution witnesses had not been contradicted constituted impermissible comment upon petitioner's failure to testify at trial.

2. Whether the prosecutor's statement in closing argument that defense cross-examination of a government witness had been "tricky" warranted a mistrial, where the prosecutor immediately agreed to strike the word "tricky."

3. Whether the district court erred in refusing to grant petitioner's request that the court instruct the jury that a plea of not guilty is a denial of the charges.

4. Whether the district court erred in admitting the testimony of a ten-year-old boy.

5. Whether the district court erred in directing counsel not to mention to the jury the fact that a co-defendant's motion for a judgment of acquittal had been granted.

6. Whether the district court erred in denying petitioner's motion for a judgment of acquittal.

7. Whether chemicals and laboratory equipment found in a barn that a co-defendant had leased were properly introduced into evidence.

8. Whether petitioner was prejudiced by a newspaper article appearing in a neighboring county that reported the granting of a co-defendant's motion for a judgment of acquittal.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of manufacturing amphetamine, in violation of 21 U.S.C. 841, one count of possession of amphetamine with intent to distribute it, in violation of 21 U.S.C. 841, and one count of conspiracy to commit the foregoing offenses, in violation of 21 U.S.C.

846. He was sentenced to three concurrent terms of three years' imprisonment, to be followed by three concurrent terms of three years' special parole.[1] The court of appeals affirmed (Pet. App. B).

The evidence at trial showed that in February 1975 petitioner became involved in an enterprise that manufactured and sold amphetamine ("speed") at a laboratory at 4217 Main Street in Philadelphia. This enterprise had been started in 1974 by petitioner's son and co-defendant, Luke Robinson, and co-defendant Joseph Antoniewicz. In November 1974, Luke Robinson went to see his wife's uncle, William Mayer, who was the president of M.B. Corporation and the principal government witness at trial. Robinson informed Mayer that he and Antoniewicz were experimenting in the manufacture of speed and showed him the equipment they were using in the basement of a house in Churchville, Pennsylvania, which Robinson was leasing, and in a barn in Trevose, Pennsylvania, which Antoniewicz was leasing (Tr. 225-233). Robinson offered Mayer $500 per pound of speed manufactured in exchange for Mayer's purchasing of the required chemicals through the M.B. Corporation. Mayer accepted this offer, and it was subsequently agreed that

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[1]Co-defendants Luke Robinson (petitioner's son) and Joseph Antoniewicz were convicted on the conspiracy count, two counts of manufacturing amphetamine, and two counts of possessing amphetamine with the intent to distribute it. Co-defendant Stanley Palmer was convicted on the conspiracy count and acquitted on one count of manufacturing amphetamine and one count of possession of amphetamine with the intent to distribute it. Co-defendant John Drum was acquitted on the conspiracy count, one count of manufacturing amphetamine, and one count of possession of amphetamine with the intent to distribute it. Co-defendant Joseph Gentile's motion for a judgment of acquittal was granted by the court at the close of the government's case.

Robinson and Antoniewicz would move their equipment to Mayer's office at 4217 Main Street (Tr. 234-236). In the months that followed, several pounds of speed were manufactured at 4217 Main Street and sold for $4,500 per pound (Tr. 243-245, 248).[2]

In February 1975, Mayer and Luke Robinson had a disagreement and Mayer ordered that the business be discontinued. Petitioner, however, persuaded Mayer to permit him to run the business on a temporary basis, without Luke Robinson, to make enough money to pay their bills (Tr. 285-286). Shortly thereafter, petitioner brought in co-defendant Stanley Palmer to work in the laboratory, and subsequently he hired co-defendant John Drum to replace Antoniewicz, who had quit (Tr. 287, 289-290). In April 1975, the laboratory was closed down, and a month or two later Luke Robinson, Palmer, and petitioner moved their equipment out of Mayer's office (Tr. 291-292).

ARGUMENT

1. Petitioner contends (Pet. 5-7) that in his closing argument the prosecutor improperly referred to the fact that government evidence had not been contradicted.[3] He argues that the prosecutor's observations constituted impermissible comment upon petitioner's failure to testify at trial.

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[2]Traces of amphetamine were found on a mirror in the laboratory in Mayer's office (Gov't Ex. 4; Tr. 41, 501) and in laboratory equipment found in the barn in Trevose (Gov't Exs. 8, 9, 10, 12; Tr. 49-54, 589).

[3]Petitioner complains of the following comments:

> * * * Mr. Bill Mayer tells Agent Miller about Churchville and about a fellow who lived in Churchville, and about things that he saw in Churchville, and about the time that he went there and saw these things and he placed the time between the last part of November, first part of December of '74 — '75 — '74 actually going on '75. It fit perfectly, the time spectrum that Mr. Micchichi testified to Luke Robinson living there in Churchville * * *. The point is, Mr. Mayer, what he told the Federal authorities after he was given immunity was right on the money. What he told us in that regard to Churchville is contradicted in no way. [Tr. 728-729.]
>
> * * * * *
>
> Consider the fact the chemist testified, uncontroverted. Defense chemist did not even examine these exhibits. It is uncontroverted that Exhibits G-8 and G-10 are amphetamines. [Tr. 740.]
>
> * * * * *
>
> I began this closing argument to you saying that there has not been a controverted fact, there has not been one contradiction. [Tr. 742.]
>
> * * * * *
>
> The fact of the matter is, [Mayer] was on that witness stand for several hours cross-examined by six lawyers. And again the Government argues to you the evidence that is now in the record shows that what he told us and what I am now going to go over is not in any way contradicted. [Tr. 745.]

[4]In *Griffin*, the prosecutor stated to the jury that the defendant "has not seen fit to take the stand and deny or explain" the prosecution's evidence (380 U.S. at 611). Moreover, the trial court advised the jury that it could take into consideration the defendant's failure to take the stand to explain evidence of facts within his knowledge (*id.* at 610).

Although a prosecutor may not comment directly upon a defendant's failure to testify at trial (*Griffin* v. *California*, 380 U.S. 609),[4] not every reference to the absence of defense evidence constitutes such a comment. The privilege against compulsory self-incrimination is violated only if the comment would naturally and necessarily be viewed by the jury as a comment on the failure of the defendant to testify. *E.g.*, *United States* v. *Williams*, 521 F. 2d 950, 953 (C.A.D.C.); *United States* v. *Williams*, 503 F. 2d 480, 484-485 (C.A. 8); *United States ex rel. D'Ambrosio* v. *Fay*, 349

F. 2d 957, 961 (C.A. 2), certiorari denied *sub nom. D'Ambrosio* v. *Fay*, 382 U.S. 921. It has uniformly been held that reference to the fact that prosecution evidence has not been contradicted does not naturally and necessarily refer to the defendant's failure to testify unless evidence contradicting the government's case could logically have come only from the defendant himself. See, *e.g.*, *United States* v. *Estrada de Castillo*, 549 F. 2d 583 (C.A. 9); *United States* v. *Bartemio*, 547 F. 2d 341 (C.A. 7); *United States* v. *Rodriguez*, 545 F. 2d 829 (C.A. 2); *United States* v. *Bishop*, 534 F. 2d 214 (C.A. 10).

In this case, the comment referring to the testimony of the government's chemist obviously does not pertain to the defendant's failure to testify; the chemical composition of the government's exhibits would normally be shown by expert testimony. The remaining comments pertain to the testimony of William Mayer, a co-conspirator; the prosecutor was arguing in support of Mayer's credibility by showing that, while his testimony had been corroborated with other evidence, it had not been contradicted. Although the defendant was in a position to contradict much of Mayer's testimony, he was by no means the only person who may have been able to do so. Mayer's account of the speed manufacturing enterprise of which petitioner became part could have been contradicted with evidence from Mayer's other employees or from the owners or subsequent tenants of the house in Churchville or the barn in Trevose. Thus, there is no reason to believe that the jury understood the remarks as comments upon petitioner's failure to testify[5] See *United States* v. *Jenkins*, 544 F. 2d 180 (C.A. 4).

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[5]There is no conflict among circuits on this issue. The cases cited by petitioner (Pet. 5), in which a prosecutor's reference to uncontradicted government evidence was held to be improper, are distinguishable from this case. In *United States* v. *Flannery*, 451 F. 2d 880 (C.A. 1); *United States* v. *Handman*, 447 F. 2d 853 (C.A. 7); *United States* v. *Rodriguez-Sandoval*, 409 F. 2d 529 (C.A. 1), certiorari denied, 414 U.S. 869; and *Desmond* v. *United States*, 345 F. 2d 225 (C.A. 1), the witness whose testimony was described as "uncontradicted" had testified to a private transaction or conversation with the defendant. In the circumstances of each of the cases, the court concluded that the jury must have understood that the defendant was the only person who could have rebutted the "uncontradicted" testimony. In *Doty* v. *United States*, 416 F. 2d 887 (C.A. 10), the prosecutor had expressly conceded that, as to two defendants who had testified, the government's case was contradicted. His subsequent comment that, as to the other defendants, the evidence was not contradicted was therefore clearly a comment upon the failure of those defendants to take the witness stand.

2. Petitioner contends (Pet. 7-8) that a mistrial should have been declared when the prosecutor in his closing argument referred to defense cross-examination of a government witness as "tricky." Immediately following petitioner's objection to this portion of closing argument, the prosecutor apologized and agreed to strike the word "tricky" (see Pet. 7). Petitioner has not shown how, under these circumstances, he was prejudiced by the prosecutor's initial choice of terms. See *Sawyer* v. *United States*, 202 U.S. 150.

3. Petitioner argues (Pet. 8) that the district court erred in refusing to instruct the jury that a plea of not guilty is a denial of the charges. He cites no authority holding that such an instruction must be given,[6] and we know of none. The court instructed the jury at some length that the government bore the burden of proving all elements of the crimes charged beyond a reasonable doubt and that

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[6]*United States* v. *DeAngelo*, 138 F. 2d 466 (C.A. 3), cited by petitioner, did not involve the question whether a defendant was entitled to have the jury instructed that a plea of not guilty is a denial of the charges. There, the question was whether, in a conspiracy prosecution, the government was precluded from relitigating factual issues determined favorably to the accused in a prior prosecution

the defendants had no obligation to prove their innocence (Tr. 856-857, 859, 861). Reading the charge as a whole, the jury could not possibly have entertained any doubt that petitioner was contesting each element of the charges against him.

4. Petitioner contends (Pet. 10-17) that the district court should not have admitted the testimony of Richard Shoemaker, a ten-year-old boy.[7] Contrary to petitioner's assertion (Pet. 14), the competency of a witness in a federal criminal trial is governed by federal, not state, standards.[8] Under Rule 601, Fed. R. Evid., all persons are competent to testify subject only to the exceptions set forth in the Federal Rules of Evidence. The Rules contain no provision for the exclusion of the testimony of children. Accordingly, children are normally competent to be witnesses; their youth, intelligence, and ability to communicate are matters bearing upon the weight of their testimony, not its admissibility.

The district court questioned Richard Shoemaker extensively as to his understanding of the importance of testifying truthfully (Pet. 10-14). Based upon the answers to those questions, it was well within the district court's

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for a substantive offense related to the conspiracy. In the course of its discussion, the court of appeals observed (138 F. 2d at 469) that "appellant's plea of not guilty to the indictment [in the first prosecution] had there put in issue every material allegation of fact contained in the indictment."

[7]Shoemaker lived next door to the barn in Trevose that Antoniewicz had leased in late 1974 and early 1975. He testified that in the summer of 1975, he had observed chemical bottles and jars in the barn.

[8]Rule 601, Fed. R. Evid., provides that the competency of witnesses shall be governed by state law only "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision * * *."

discretion to permit Shoemaker to testify.[9] See *United States* v. *Hardin*, 443 F. 2d 735 (C.A.D.C.).

5. Petitioner argues (Pet. 18-19) that the district court improperly instructed counsel not to mention to the jury that co-defendant Gentile's motion for a judgment of acquittal had been granted. Prior to closing arguments, the court instructed the jury (Tr. 722-723) that Gentile was no longer involved in the case and that they should not "speculate as to why." Petitioner did not object to this instruction, and he did not object when the court prevented the prosecutor from discussing Gentile's acquittal in his closing argument (Tr. 733-734; Pet. 18-19). Nor did petitioner's counsel at any time indicate any desire to discuss Gentile's acquittal in his closing argument.

Since petitioner did not raise this issue in the district court, he should not be heard to do so now. (See, *e.g.*, *Tacon* v. *Arizona*, 410 U.S. 351.) In any event, the court's ruling was correct. Gentile's acquittal was based upon William Mayer's inability to identify him at trial (Tr. 617-618). The acquittal thus was wholly unrelated to the government's case against petitioner. Any attempt by petitioner to make use of the acquittal could only have confused the factual issues at trial and generated unfair prejudice against the government. The district court acted well within the scope of its discretion over such matters in instructing counsel to avoid mention of Gentile's acquittal. See *United States* v. *Masterson*, 529 F. 2d 30, 32 (C.A. 9), certiorari denied, 426 U.S. 908.

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[9]Shoemaker indicated that those who lie "get in' trouble" (see Pet. 11) and that lying is "sinning" (see Pet. 13). The fact that in response to defense counsel's questions he was unable to say specifically "really what happens if you tell a lie" (Pet. 13-14) shows very little. Indeed, it would have been difficult for most adults to state the consequences of lying with the specificity petitioner would require, since those consequences vary greatly depending upon circumstances.

6. Petitioner contends (Pet. 19-21) that the district court erred in denying his motion for a judgment of acquittal. He argues that the government failed to prove that the substance manufactured by petitioner and his co-defendants was amphetamine. But William Mayer testified that Luke Robinson told him that the substance they were producing was speed (amphetamine). The government also introduced expert testimony that amphetamine was present in laboratory containers found in the barn in Trevose and on a mirror in the room used as a laboratory in Mayer's office. Finally, Mayer testified that he participated in sales of the substance manufactured for $4,500 per pound. This evidence was more than sufficient to permit the jury reasonably to conclude that the substance produced was amphetamine.

7. Petitioner argues (Pet. 22-23) that the district court erred in admitting into evidence laboratory equipment and amphetamine found on February 17, 1976, in the barn in Trevose because there was no indication that co-defendant Antoniewicz, who had leased the barn but who had vacated the premises at the end of March 1975 (Tr. 448), had left these items. But Richard Shoemaker, who lived next door to the barn, testified that in the summer of 1975 he observed chemical bottles and jars in the barn (Tr. 556-558), and Richard's father, George Shoemaker, testified that there had been no activity in the barn while the premises were vacant in the spring and summer of 1975 (Tr. 566-567). Anthony Gentile, who moved onto the premises in September 1975, testified that he had found in the barn "various kinds of chemistry equipment, bottles [and] jars," some of which contained "foul smelling chemicals" (Tr. 573). Thus, it could fairly be inferred that the equipment found in the barn in February 1976 had been left there by Antoniewicz, and the evidence was

properly submitted to the jury for an assessment of its weight.[10]

8. Petitioner contends (Pet. 24-25) that he may have been prejudiced by a newspaper article reporting the granting of co-defendant Gentile's motion for a judgment of acquittal, which appeared in a Bucks County newspaper during the weekend of December 4-5, 1976, in the midst of the jury's deliberations. His claim is based upon the fact that one of the jurors was a resident of Bucks County. On the afternoon of Friday, December 3, however, the district judge instructed the jurors not to discuss the case over the weekend (Tr. 887), and prior to trial the court instructed the jurors not to read or listen to any accounts of the trial (Tr. 8). On Monday morning, December 6, the court asked the jurors whether they had read anything about the trial during the weekend, and no juror responded affirmatively (Tr. 892). At that time petitioner expressed no dissatisfaction with the measures taken by the court to insure that none of the jurors had seen or heard about the article, and he does not now offer any reasons for believing that the action taken by the district court was inadequate. In any event, the district court's measures to insure that the jurors had not been affected by publicity were appropriate under the circumstances. See, *e.g.*, *United States* v. *Hankish*, 502 F. 2d 71, 76-77 (C.A. 4).

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[10]Contrary to petitioner's assertion (Pet. 21), Gentile did not testify that, in cleaning out the barn when he moved onto the premises, he had thrown out all of the laboratory equipment. Rather, Gentile said that he had discarded "a lot of" the equipment he had found in the barn (Tr. 573).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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